



## **FACTUAL HISTORY**

Appellant, a 54-year-old clerk, injured her left shoulder on May 14, 2003. The Office accepted her claim for left shoulder tendinitis and left shoulder osteoarthritis under claim number xxxxxx046.

On October 22, 2004 appellant underwent arthroscopic debridement of the rotator cuff, decompression and resection of distal clavicle. The procedure was performed by Dr. Lawrence S. Pollack, an osteopath specializing in orthopedic surgery, on October 22, 2004.

On July 25, 2005 appellant filed claim for a bilateral carpal tunnel condition, claim number xxxxxx713. The Office accepted this claim for bilateral carpal tunnel syndrome.

Dr. Pollack performed a left carpal tunnel release on May 12, 2006 and a right carpal tunnel release on September 18, 2006.

In a November 18, 2008 report, Dr. Arthur Becan, a specialist in orthopedic surgery, found that appellant had 39 percent left upper extremity impairment and 38 percent right upper extremity impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition. With regard to the left shoulder, he rated impairment on the following factors: a slight range of motion deficit on flexion for a one percent impairment under Figure 16-40, page 476, a 10 percent impairment for a resection arthroscopy on October 22, 2004 under Table 16-27, page 506; and a 31 percent impairment for a Grade 2 median nerve sensory deficit at Table 16-10, page 482,<sup>2</sup> or a total 39 percent left upper extremity impairment.

Dr. Becan calculated 38 percent right upper extremity impairment by finding a 10 percent impairment based on right lateral pinch grip testing pursuant to Table 16-33 and Table 16-34 at page 482 and 31 percent impairment for a Grade 2 median nerve sensory deficit at Table 16-10, page 482.<sup>3</sup>

On February 4 and 10, 2009 appellant filed a claim for a schedule award based on a partial loss of use of her upper extremities.

In a February 6, 2009 report, Dr. Arnold T. Berman, Board-certified in orthopedic surgery and an Office medical adviser, reviewed Dr. Becan's November 18, 2008 report. He found that appellant had a 10 percent impairment of the right and left upper extremities based on her accepted bilateral carpal tunnel syndrome. Dr. Berman did not accept Dr. Becan's assessment of left shoulder impairment because the Office, in claim number xxxxxx713, did not accept a left shoulder condition. He did not allow Dr. Becan's finding of an impairment due to a Grade 2 sensory deficit for the right and left median nerve pursuant to Table 16-10 at page 482. Dr. Berman stated that appellant did not have decreased protective sensibility required under that table, as evidenced by her functional level of restricted duty and other activities of daily living. He

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<sup>2</sup> Dr. Becan, who noted numbness in appellant's right and left hands on examination, derived this rating through Semmes-Weinstein Monofilament testing, which showed a diminished light touch sensibility at 3.6 milligrams over the median nerve distribution in both the right and left hands.

<sup>3</sup> *Id.*

did not allow the 10 percent impairment rating for right-sided lateral pinch deficit because it conflicted with section 16.8a of the A.M.A., *Guides*, which states that decreased strength cannot be rated in the presence of painful conditions and that impairment ratings based on objective anatomic findings should take precedence.<sup>4</sup> Dr. Berman further stated that the A.M.A., *Guides* state at page 507 that strength measurements are influenced by subjective factors that are difficult to control.

Dr. Berman rated appellant's median nerve deficit below the mid-forearm by noting that 39 percent impairment was the maximum permitted for sensory deficit or pain at Table 16-15, page 492.<sup>5</sup> He utilized page 482, Table 16-10,<sup>6</sup> to rate sensory deficit as Grade 4 or 25 percent. Dr. Berman multiplied the 39 percent maximum by 25 percent deficit to total 10 percent impairment of the right and left upper extremities.

In order to determine the degree of impairment to appellant's left upper extremity based on her accepted left shoulder condition, the Office in claim number xxxxxx046 referred her for a second opinion examination to Dr. Robert F. Draper, Board-certified in orthopedic surgery. In a February 24, 2009 report, Dr. Draper found that she had a two percent impairment of the left upper extremity. He based this rating on one percent impairment for loss of flexion under Figure 16-40 at page 476 of the A.M.A., *Guides* and a one percent impairment for loss of abduction under Figure 16-42 at page 477. Dr. Draper found that appellant reached maximum medical improvement on January 2, 2006.

By decision dated March 3, 2009, the Office granted appellant schedule awards for 10 percent permanent impairment to the right and left upper extremities. This award covered the period November 18, 2008 to January 28, 2010 or a total of 62.40 weeks of compensation.

By letter dated March 16, 2009, appellant's attorney requested an oral hearing under claim number xxxxxx713, which was held on July 28, 2009.

In an April 7, 2009 report, Dr. Berman found in claim number xxxxxx046 that appellant had a 12 percent impairment of the left upper extremity based her accepted left shoulder condition. He noted that Dr. Draper had accorded a 2 percent impairment for loss of range of motion in the left shoulder, but found that she was entitled to an additional 10 percent impairment for her October 22, 2004 surgery for left shoulder resection of the distal clavicle pursuant to Table 16-27 at page 506, for a total 12 percent left upper extremity impairment. Dr. Draper also found that appellant reached maximum medical improvement on February 24, 2009, the date of his examination.

In a supplemental report dated April 27, 2009, Dr. Berman combined the 12 percent left shoulder impairment from claim number xxxxxx046 with the 10 percent left-sided carpal tunnel impairment from claim number xxxxxx713 to rate a total 21 percent left upper extremity impairment, pursuant to the Combined Values Chart at page 604.

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<sup>4</sup> A.M.A., *Guides*, page 508.

<sup>5</sup> *Id.* at 492

<sup>6</sup> *Id.* at 482

By decision dated April 27, 2009, the Office found that appellant had a 21 percent permanent impairment of the left upper extremity under both claim numbers. This award granted compensation from June 25, 2009 to January 20, 2010 or total of 34.32 weeks of compensation. Appellant was paid at the weekly rate of \$852.86, the rate in effect as of October 22, 2004.

By letter dated May 1, 2009, appellant's attorney requested an oral hearing for claim number xxxxxx046, which was held on August 20, 2009.

At the July 28, 2009 hearing, appellant's attorney contended that because appellant also had an accepted claim for a left upper extremity impairment based on a preexisting left shoulder condition under claim number xxxxxx046, for which she had received a separate schedule award, her award should have been paid at the higher pay rate in effect as of July 14, 2006. Counsel also requested that claim numbers xxxxxx713 and xxxxxx046 be combined. She argued that Dr. Berman erred in modifying Dr. Becan's finding of a 31 percent impairment based on a Grade 2 sensory deficit to each upper extremity. Counsel contended that Dr. Becan's opinion was entitled to greater weight because he was the examining physician. She argued that Dr. Berman improperly disregarded Dr. Becan's impairment rating for pinch strength testing contending that appellant was able to exercise maximal force under testing despite her pain.

By decision dated October 14, 2009, an Office hearing representative affirmed the March 3, 2009 decision. She noted that the left shoulder condition was filed and accepted as a distinct case based on separate work factors. The Office hearing representative further found that Dr. Berman adequately explained why Dr. Becan's findings on examination regarding pinch strength deficit for the right and left median nerve correlated with a Grade 4 impairment under the A.M.A., *Guides* as opposed to a Grade 2 impairment. She noted that the Office should combine claim numbers xxxxxx713 and xxxxxx046, as they both pertained to upper extremity conditions accepted by the Office. The Office hearing representative noted that a hearing representative with jurisdiction over the April 27, 2009 schedule award decision should issue a separate decision addressing whether the schedule award under claim number xxxxxx046 should be paid at a higher pay rate.

By decision dated November 18, 2009, an Office hearing representative affirmed the April 27, 2009 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>7</sup> set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.<sup>8</sup> However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has

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<sup>7</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>8</sup> *Id.* at § 8107(c)(19).

adopted the A.M.A., *Guides* as the standard to be used for evaluating schedule losses.<sup>9</sup> The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.

### **ANALYSIS -- ISSUE 1**

The Board finds that the case is not in posture for decision.

Appellant's attorney argues in his appeal brief that there is a conflict in the medical evidence between Dr. Becan's opinion which indicated that appellant sustained a 39 percent impairment to the left upper extremity and a 38 percent impairment to the right upper extremity and that of Dr. Berman, who found that appellant had a 21 percent impairment to the left upper extremity and a 10 percent impairment to the right upper extremity. The Board finds that, as the record now stands, a conflict exists in the medical opinion evidence between Dr. Becan and Dr. Berman concerning the degree of appellant's permanent impairment of the left and right upper extremity. In a January 29, 2009 report, Dr. Berman disagreed with Dr. Becan's 38 percent left upper extremity rating, finding that the principles set forth at section 16.8a of the A.M.A., *Guides* precluded his 10 percent impairment rating for left pinch deficit based on section 16.8a of the A.M.A., *Guides*. This section states:

“In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the A.M.A., *Guides*, the loss of strength may be rated separately.... If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise the impairment ratings based on objective anatomic findings take precedence. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region to be evaluated.”<sup>10</sup>

The Board notes that Dr. Becan examined appellant and based his 10 percent rating on measurements derived from using a Jamar dynamometer. Appellant's attorney contended that Dr. Becan's findings demonstrated that appellant was able to exercise maximal force under testing despite her pain. There is also a conflict between Dr. Becan and Dr. Berman concerning whether appellant had a Grade 2 or Grade 4 sensory deficit of the median nerve.

The Board will set aside the October 14 and November 18, 2009 Office decisions and remand the case for referral of appellant to an impartial medical specialist to resolve the conflict. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision on the extent of permanent impairment to appellant's upper extremity.

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<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Supra* note 4.

## LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee's monthly pay.<sup>11</sup> For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4), which defines monthly pay as:

“[The] monthly pay at the time of injury or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...”<sup>12</sup>

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).<sup>13</sup>

## ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision.

Appellant's attorney contends that her pay rate for the schedule award based on the left upper extremity impairment should be calculated based on the higher pay rate, with a date of injury of July 14, 2005 and a work stoppage beginning May 12, 2006 due to the accepted bilateral carpal tunnel condition. Counsel contends that because the two accepted conditions, under claim numbers xxxxxx046 and xxxxxx713, were combined into a total left upper extremity impairment, the left shoulder condition, under claim number xxxxxx046, should have been considered a preexisting medical condition in the carpal tunnel claim. He therefore contends that the rate of pay for schedule award purposes for both conditions should have been May 12, 2006.

The Board notes that in all situations, including those involving a schedule award, compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins or the rate at the time of recurrence of disability of the type described in section 8101(4) of the Act, whichever is greater.<sup>14</sup> In schedule award claims where an injury is sustained over a period of time, to determine the date of injury, the Office must ascertain the date of last exposure to employment factors, as well as the date of the medical evaluation which substantiates the degree of permanent impairment.<sup>15</sup> Where exposure to work factors continues, the date of injury is the date of the relevant medical examination, *i.e.*, the date of the medical

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<sup>11</sup> 5 U.S.C. § 8107.

<sup>12</sup> *Id.* at § 8101(4).

<sup>13</sup> See *Robert A. Flint*, 57 ECAB 369 (2006).

<sup>14</sup> See *Charles P. Mulholland*, 48 ECAB 604 (1997).

<sup>15</sup> *Id.*; *Leonard E. Redway*, 28 ECAB 242 (1977).

examination upon which the extent of permanent impairment has been determined.<sup>16</sup> In this case, appellant sustained two accepted conditions, a left shoulder condition and a bilateral carpal tunnel condition, which were ultimately combined into one award based on a left upper extremity impairment. The Office considered both of these conditions in rating impairment for the left upper extremity. The Board notes that, as both injuries pertained to a schedule award for a left upper extremity, the Office should determine whether appellant's pay rate based upon her monthly pay on the date of the last injury for the left upper extremity, the most recent date she was exposed to work factors from her left upper extremity impairment is appropriate. Under the circumstances of this case therefore the Office should obtain further information to properly calculate appellant's pay rate as of May 14, 2006.

**CONCLUSION**

The Board finds that the case is not in posture for decision. The case is remanded for further development of the medical evidence and evidence relating to appellant's pay rate.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 18, 2009 and October 14, 2009 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: January 25, 2011  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> *Id.*